

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Asheville Division

In Re:) Case No. 96-10358
) Chapter 12
NOEL C. McCRAW d/b/a AK & NC)
McCraw Orchards, and wife,)
NORMA P. McCRAW,)
)
Debtor(s).)
_____)



ORDER

JUDGMENT ENTERED ON APR 06 2004

This matter is before the court upon the Motion to Determine Discharge of the debtors and the response thereto of the United States of America on behalf of its agency, the United States Department of Agriculture, Farm Service Agency (the "FSA"). After consideration of the motion and the briefs and arguments of counsel, the court has concluded that the FSA's Class 5(c) unsecured deficiency claim was subject to discharge by the court's order of February 23, 2003, such that its actions to collect this debt post-discharge were a violation of the discharge injunction of 11 U.S.C. § 524(a)(2). However, the debtors must make some accomodation for the FSA's Class 5(c) deficiency claim.

1. The debtors filed a voluntary Chapter 12 petition on June 18, 1996.

2. During the Chapter 12 proceeding, the debtors and the FSA engaged in a contested confirmation hearing in which the court valued several parcels of real property utilized by the debtors to operate their farm. With respect to the Jackson Loop Road property, the court valued that tract at \$82,000.00, giving the FSA

a secured claim for that amount. This secured claim was treated in Class 5(c) of the Chapter 12 Plan.

3. The debtors filed an Approved Chapter 12 Plan which committed to pay the FSA in installments the value of its lien on the Jackson Loop Road property; subject, however, to the debtors' right to abandon the property to the FSA. Part III A of the Plan treated Class 5(c) as follows:

Class 5(c). Secured Real Property Claim of USA/Farm Service Agency of approximately \$82,000.00 secured by 20 acres on Jackson Loop Road. The allowed secured claim as of the petition date of approximately \$82,000.00 shall be secured by real property . . . as of October 22, 1997 confirmation date. The allowed secured claim secured by real property shall be amortized for 30 years with a 15 year balloon (February 15, 2013) and the debtors will pay an annual payment beginning February 15, 1998 and each year thereafter for the 15 year period at nine (9%) simple annual percentage rate The new Chapter 12 indebtedness shall be evidenced by the terms of the Chapter 12 plan as it modifies the existing promissory note and deed of trust. USA/FSA shall retain its lien. (Because the valuation of this tract appears to be an aberration of the \$3,105.00 per acre value utilized on all other farm acreage, at their option, the debtors may abandon to FSA.)

See Approved Chapter 12 Plan of February 11, 1998, Case No. 96-10358. The Debtors Approved Chapter 12 Plan was confirmed by the court by Order dated February 12, 1998.

4. The debtors made some payments to the FSA on their Class 5(c) secured claim but ultimately exercised the option to abandon the Jackson Loop Road property to the FSA.

5. The FSA subsequently had the Chapter 12 Trustee sell the Jackson Loop Road tract at auction. The sale was conducted in

2000, and the trustee distributed \$62,513.65 to the FSA following the sale, leaving the FSA an unsecured deficiency claim of approximately \$20,000.

6. The debtors timely completed all payments to the Trustee under their Chapter 12 Plan (other than on the FSA's Class 5(c) unsecured deficiency claim). On February 13, 2003, the Trustee filed his Final Report and Accounting of Trustee and Motion for Discharge. No objections were filed to the Trustee's report and accounting or to his request for discharge.

7. On February 28, 2003, the court entered its Order Discharging Debtor after Completion of Chapter 12 Plan and the Final decree, which closed the case.

8. After the discharge was entered, the debtors received demand letters on several occasions from the FSA requesting payment of the unsecured deficiency claim which resulted from the sale of the Jackson Loop Road tract.

9. The debtors responded to the FSA's demand letters by filing their Motion to Determine Discharge, in which they argue that the FSA's unsecured deficiency claim was discharged by the court's Order Discharging Debtor of February 28, 2003. Thus, they contend that the FSA's attempts to collect this debt, post-discharge, willfully violated the court orders and the post-discharge injunction of 11 U.S.C. §§ 1221 and 524(a) and should be sanctioned accordingly.

10. In its response, the FSA asserts that 11 U.S.C. § 1228 provides certain exceptions to discharge, including debts provided for under 11 U.S.C. § 1222(b)(9).

11. Section 1222(b)(9), in turn, indicates that the Plan may provide for payment of allowed secured claims consistent with 11 U.S.C. § 1225(a)(5) over a period exceeding the three and five year periods provided for under section 1222(c). Section 1225(a)(5) provides in pertinent part that the court shall confirm a plan if:

- (5) with respect to each allowed secured claim provided for by the plan -
 - (A) the holder of such claim has accepted the plan;
 - (B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
 - (ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or
 - (C) the debtor surrenders the property securing such claim to such holder

See 11 U.S.C. § 1225(5).

12. The FSA argues that their Class 5(c) claim meets the requirements of 11 U.S.C. §§ 1225(a)(5) and 1222(b)(9), and is, therefore, not dischargeable under the express provisions of 11 U.S.C. § 1228(a)(1). Their claim does, in fact, meet the requirements of 11 U.S.C. §§ 1225(a)(5) and 1222(b)(9) and would appear to fall within the exception to discharge.

13. However, as Colliers explains, "[t]he reason for [the exception under 11 U.S.C. § 1228(a)(1)] is obvious: if the plan provides that a secured claim is to be paid over twenty years, the debtor's obligation to pay that claim cannot be discharged at the end of three years. Such a claim will be discharged only at such time as the claim is paid." See 8 COLLIER ON BANKRUPTCY ¶ 1228.02[3][a] (15th ed. rev.).

14. In this case, the debtors' Plan provided them the option of either paying the secured claim over a period of fifteen years at an interest rate of 9% or abandoning the property. Had the debtors paid the claim over the 15 years, the FSA's secured claim clearly would not be discharged until the claim had been paid in full.

15. However, the debtors exercised their option under the Plan to abandon the property, and they did so approximately two years before the Plan was completed. Critical to the outcome of the debtors' Motion to Determine Discharge, is an understanding of what is meant by the use of the term "abandon" in the Plan. By abandon, the Plan meant that the debtors could relinquish the property to the secured creditor, which is exactly what the debtors did. The FSA then had the Chapter 12 Trustee sell the property at auction, and the Trustee distributed \$62,513.65 to the FSA - approximately \$20,000 less than their \$82,000 secured claim.

16. According to Colliers, "[i]f liquidation [following abandonment] yields a surplus, the creditor must pay the surplus to holders of junior liens or, if there are none, return it to the debtor. If liquidation produces a deficiency, the creditor may assert the deficiency as an unsecured claim and receive its pro rata share of payments made under the plan with regard to unsecured claims." See 8 COLLIER ON BANKRUPTCY ¶ 1225.03[5] (15th ed. rev.).

17. Because the debtors opted to abandon the property approximately two years before the Plan was completed, the court finds that the FSA's deficiency claim is an unsecured claim which should have been included in and paid in accordance with the Class 7 unsecured claims under the Plan. Therefore, the FSA's actions to collect this debt in full post-discharge, were a violation of the discharge injunction of 11 U.S.C. § 524(a)(2).

18. However, the court finds that the FSA reasonably interpreted the Plan and the law as not discharging their Class 5(c) claim until it had been paid in full. Therefore, because the FSA acted with a good faith, yet mistaken, belief that its post-discharge collection actions were permissible, the court will not assess sanctions against the FSA for its violation of 11 U.S.C. § 524(a)(2).

19. With respect to payment of the FSA's unsecured deficiency claim, it appears from the record that following the sale of the

Jackson Loop Road tract, the debtors did not modify their Plan to accommodate this claim, and therefore it has not been paid.

20. In summary, it appears that all parties have acted somewhat improvidently: The debtors should have moved to modify their Plan to accommodate the FSA's Class 5(c) deficiency claim, but they did not do that during the pendency of the Plan. The FSA should have objected to the absence of payment, but it did not and instead waited to seek collection of the debt after discharge. The Trustee perceived nothing wrong, filed his final report and accounting, and moved for discharge unaware a claim existed that had not been paid. No party objected to the Trustee's report, so the court erroneously entered its discharge Order of February 23, 2003. But, the latent deficiency has now been brought to light, and the court believes that the best course would be to conduct a further hearing in this case to determine how, if at all, to accommodate the FSA's Class 5(c) deficiency claim.

21. Thus, the debtors should have thirty (30) days from the date of this Order to file a motion addressing payment of the FSA's unsecured deficiency claim. The court will conduct a hearing on the debtors' motion on May 19, 2004, at 9:30 a.m., at the United States Bankruptcy Court, 100 Otis Street, Room 112, Asheville, North Carolina, 28801.

It is therefore **ORDERED** that:

1. The debtors' Motion to Determine Discharge is GRANTED;

2. The FSA is enjoined from taking further steps to collect their Class 5(c) unsecured deficiency claim from the debtors pending further orders of this court;

3. The debtors have thirty (30) days from the date of the entry of this Order to file a motion addressing payment of the FSA's Class 5(c) unsecured deficiency claim; and

4. The Court will conduct a hearing on the debtors' motion on May 19, 2004, at 9:30 a.m., at the United States Bankruptcy Court, 100 Otis Street, Room 112, Asheville, North Carolina, 28801.


Dated as of date entered

George R. Hodges
United States Bankruptcy Judge